85-1177

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

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WALLACE MERRELL MILLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

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QUESTION PRESENTED

1. Was petitioner's constitutional right to privacy violated by his conviction, under the 1984 amendment to the Child Protection Act, for receiving child pornographic material where he received that material in his own post office box and took it directly to his home where it was viewed by no one other than himself and where there was absolutely no evidence that petitioner distributed or otherwise disseminated the materials.

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The petitioner Wallace Merrell Miller respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on November 21, 1985.

OPINION BELOW

The opinion of the Court of Appeals appears in the Appendix hereto. It is reported at 776 F.2d 978 (11th Cir. 1985).

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JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1985 and this petition was filed within 60 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

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STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ 2252

(a) Any person who—

(2) Knowingly receives or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed . . . if

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) the visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section

(b) Any individual who violates this section shall be fined not more than $100,000 or imprisoned not more than 10 years or both, but if such individual has a prior conviction under this section, such individual shall be fined not more

than $200,000, or imprisoned not less than 2 years or more than 15 years or both. Any organization which violates this section shall be fined not more than $250,000.

———o———

STATEMENT OF THE CASE

The petitioner, Wallace Merrell Miller is a businessman who resides in Montgomery, Alabama. In August of 1984, he received a booklet in his post office box which contained material depicting minors engaging in sexually explicit conduct. (Tr.3-4)[1] He had previously ordered the booklet from Europe. (Tr.14-15). He removed the booklet from his post office box and took it immediately to his home where the material remained until it was seized on October 1, 1984 by federal agents, acting pursuant to a search warrant.

While the booklet was in petitioner's home, he did not show it to anyone, distribute it to anyone, trade it with anyone or exchange it with anyone. He made no use of it other than to view it in the privacy of his own home. (Tr. 4-5). When he ordered the material, he had no intent to do anything with the material but view it in the privacy of his own home. (Tr.5). The Assistant United States Attorney prosecuting the case admitted that "We

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1. As used herein, the designation "Tr. —" shall be used to refer to the transcript of the proceedings in the district court. The designation "R. —" shall be used to refer to the clerk's record.

have no evidence other than he received the materials". (Tr.5-6).

The petioner was indicted on November 14, 1984. The indictment charged him with five counts or receiving materials depicting minors engaged in sexually explicit conduct in violation of Title 18, § 2252 of the United States Code. (R.7-9). On November 28, 1984, the petitioner entered a plea of not guilty.

On December 14, 1984, the petitioner, through counsel, filed a motion to dismiss the indictment on the grounds, *inter alia* that the statute under which he was indicted could not be applied to his conduct without violating his constitutional right to privacy. (R.16-17). The motion was denied on December 28, 1984 and a motion for reconsideration was denied on January 10, 1985.

On January 17, 1985, the court permitted the petitioner to present evidence in support of his motion to dismiss. (Tr.3). Following the presentation of the evidence, petitioner's counsel renewed his motion to dismiss and it was again denied. (Tr.6). Following the third denial of his motion to dismiss, petitioner entered a conditional guilty plea pursuant to the Rule 11 (a) (2), Federal Rules of Criminal Procedure. The conditional plea agreement read in relevant part:

> . . . defendant agrees to enter a plea of guilty to one count of the indictment on the condition that the defendant reserves his right to appeal the court's denial of his motion to dismiss the indictment which challenges the constitutionality of the statute under which the defendant was indicted both on its face and as it applies to the conduct of this defendant.

(R.86).

On February 14, 1985, the petitioner was adjudged guilty and ordered imprisoned for observation and study for the maximum period authorized by law. (R.92). The district court allowed him to remain free on bond pending the outcome of his appeal.

On November 21, 1985 the Court of Appeals affirmed his conviction. On December 12, 1985 that court stayed its mandate so as to allow petitioner to remain free pending the filing and disposition of this petition.

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REASON FOR GRANTING THE WRIT

1. The Decision Below Decides a Significant Issue Which This Court Has Never Addressed Concerning the Impact of the 1984 Amendments to the Child Protection Act on the Constitutional Right to Privacy and Does So In a Manner which Seriously Undermines That Right.

In 1977, Congress enacted 18 U.S.C. § 2252, the legislation known as the Child Protection Act. The portion of that law which is specifically relevant to this case made it a criminal act to knowingly receive child pornography "for the purposes of sale or distribution for sale". 18 U.S.C. § 2252 (a) (2) (1978). In 1984, Congress amended the provisions of § 2252 to eliminate the so-called commercial purpose requirement. The section now forbids, according to the opinion below, mere knowing reception of material prohibited by the act without reference to the motives of the receiver. There is no longer a statutory requirement that the receipt of the material be for the purposes of sale or distribution before a violation can be found. 18 U.S.C. § 2252 (a) (2) (as amended May 18, 1984).

Petitioner was among the first, if not the first, person indicted under the amended provisions of the Act. His case is the first case to reach the appellate courts and his case squarely raises the right to privacy problems associated with government enforcement of the 1984 amendment because the opinion below affirms his conviction for purely private, non-distributive reception.

Petitioner is plainly not a distributor, seller, dealer or disseminator of the material which § 2252 proscribes. He is a private citizen who received material of the type referenced in § 2252 in his own post office box and took it immediately to his own home where it was viewed by no one but himself. He did not distribute it, trade it, exchange it, disseminate it or give it away. His convicton thus runs afoul of the right to privacy notions articulated by this court in *Stanley v. Georgia,* 394 U.S. 557 (1969) because the activity for which he is being punished, i.e. simple reception, is inextricably intertwined with that right.

Although this court has discussed the implications of *Stanley v. Georgia* in four post-*Stanley* opinions,[2] this court has never decided the issue presented by this case —whether the private non-commercial, non-distributive reception of otherwise prohibited materials which is inextricably intertwined with private use in the home can be constitutionally punished.

The cases previously decided do not reach that issue because they deal with issues involving distribution and

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2. United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200 Ft. Reels of Super 8mm Film, 413 U.S. 123 (1973); United States v. Thirty Seven Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 351 (1971).

importation. In *United States v. Thirty Seven Photographs,* 402 U.S. 363 (1971) and *United States v. Reidel,* 403 U.S. 351 (1971), for example, this court simply held that the *Stanley* right to privacy did not give rise to a correlative right to distribute or sell prohibited materials. In *United States v. Orito,* 413 U.S. 139 (1973) the court held that the *Stanley* right to privacy did not establish a correlative right to transport obscene materials in interstate commerce. Finally, in *United States v. 12 200 Ft. Reels of Super 8mm Film,* 413 U.S. 123 (1973), this court decided that Congress could, without violating the *Stanley* right to privacy, prohibit the importation of obscene materials even where they were intended for private personal use and possession.

This case, however, is not any like any of the previously decided post-*Stanley* cases. In those cases, the power of the government was used directly against persons seeking to sell, distribute, transport or import pornographic materials. In this case, the power of the government is being used against a person who received materials in his post office box and immediately took them home. The power of the government is being used to infringe on petitioner's right to privacy.

There is no hint in the legislative history to the 1984 amendments that Congress intended those amendments to be used to punish the purely private, non-commercial, nondistributive type of reception presented by this case. Rather, the legislative history demonstrates that Congress intended the law to reach the disseminators and traffickers of child pornography, not the private receivers. Congress, by eliminating the "for purpose of sale" language simply

sought to plug a loophole in the law to allow the statute to reach all disseminators of child pornography whether their activities were accompanied by a commercial purpose or not. The law was changed to reach traders and exchangers as well as sellers and distributors. The petitioner is none of those.

As the Senate Report on the amendments which are here at issue notes, the purpose in removing the "for purpose of sale" requirements was to ". . . remove the requirement that production and distribution be for commercial purpose." S.Rep.No. 169, 98th Cong., 1st Sess. 5 (1983). Such a change was necessary, according to a Justice Department spokesperson, because:

> Many individuals who distribute materials covered by 18 U.S.C. § 2252 do so by trade or exchange without any commercial purpose and thereby avoid violations of this provision.

S.Rep. at 12. See also H.Rep. No. 536, 98th Cong., 2nd Sess. 2 (1983). See also H.Rep., p.11 (Remarks of Mark Richard). This sentiment was repeated throughout the legislative process leading to the enactment of the 1984 amendment. As one of the speakers remarked:

> The present Act does not address the traders and lenders of child pornography, who we have found account for an appreciable number of those individuals involved in the trafficking of child pornography.

Exploited and Missing Children, Hearing on S.1701, Before the Subcommittee on Juvenile Justice of the Senate Committee on the Judiciary, 97th Congress, 2nd Session, p.48.

It is thus clear that when Congress enacted the 1984 amendments, it did so to permit a broader attack on per-

sons who sell, trade, lend, exchange or otherwise disseminate pornography and who had previously escaped punishment because of the commercial purpose language of the 1977 Act. There was no indication that Congress amended the Child Protection Act so as to get at persons, like petitioner who were engaged in simple, private non-distributive reception.

Because the opinion below is the first court of appeals decision construing the 1984 amendments, it is the benchmark by which constitutional attacks on the application of the 1984 amendments will be measured in the lower courts throughout this country. It is also an opinion which seriously undermines the importance and scope of the right to privacy. It is absolutely essential that this court review the decision below to clarify the serious question of whether or not the government may utilize the 1984 amendments to the Child Protection Act to send to prison citizens who do not distribute, disseminate, trade, import, lend or exchange child pornographic materials but simply receive them in their post office box or mailbox for immediate use in the privacy of their own home.

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CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES of America,

Plaintiff-Appellee,

v.

Wallace Merrell MILLER,

Defendant-Appellant.

No. 85-7142.

United States Court of Appeals,
Eleventh Circuit.

Nov. 21, 1985.

Defendant was convicted in the United States District Court for the Middle District of Alabama, Robert E. Varner, J., of knowingly receiving child pornography through the mail, and he appealed. The Court of Appeals held that: (1) child pornography statute applied, and (2) the statute did not violate defendant's constitutional right to privacy.

Affirmed.

1. Post Office 31(3)

Child pornography statute [18 U.S.C.A. § 2252(a)(2)] applied to defendant who knowingly received child pornography through the mail, even though he did not intend to distribute the material.

2. Constitutional Law 82(10)

Conviction for knowingly receiving child pornography through the mail did not violate constitutional privacy right of defendant who received the booklet at his post office box and took it directly to his home. 18 U.S.C.A. § 2252(a)(2).

Appeal from the United States District Court for the Middle District of Alabama.

Before HILL and CLARK, Circuit Judges, and HOBBS*, Chief District Judge.

PER CURIAM:

Wallace Merrell Miller ordered a booklet from Europe depicting minors engaged in sexually explicit conduct. He received the booklet in his post office box in Montgomery, Alabama, and took it to his home, where it remained until seized by federal agents. There was no evidence that Miller had any intent to distribute, sell or trade the booklet.

The district court denied Miller's motion to dismiss the indictment in which he argued that 18 U.S.C. § 2252 does not apply to his conduct and that, if it does, it is unconstitutional. Miller thereupon entered a conditional guilty plea to one count of knowingly receiving child pornography through the mail in violation of 18 U.S.C. § 2252 (1984)[1]. On this appeal, Miller reasserts his grounds for

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* Honorable Truman M. Hobbs, Chief U.S. District Judge for the Middle District of Alabama, sitting by designation.

1. § 2252(a) provides:

> Any person who
>
> . . . . .
>
> (2)knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed . . . , if
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexual explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> shall be punished . . . .

dismissing the indictment. We affirm the action of the district court.

APPLICABILITY OF THE STATUTE

Miller was convicted under a statute which was originally enacted as the "Protection of Children Against Sexual Exploitation Act.[2]" Congress decided that this Act was necessary because existing laws were inadequate to protect against the use of children as prostitutes or as the subject of pornographic materials. S.Rep. No. 95-438, 96th Cong., 2d Sess. 5-6, *reprinted in* 1978 *U.S.Code Cong. & Ad.News* 40, 42-43. Congress concluded that child pornography and child prostitution had become a highly organized, multimillion dollar industry operating nationwide; that both the children involved and society in general were being harmed by the industry; and that child prostitution and the sale and distribution of child pornography were being conducted, to a large extent, through the mails and other instrumentalities of interstate and foreign commerce.

Congress amended the Act in 1984[3] to delete the "commercial purpose" language from 18 U.S.C. § 2252. As amended, the statute no longer proscribes "knowingly receiv[ing] for the purpose of sale or distribution for sale . . . any obscene visual or print medium that has been . . . mailed . . . ," but rather forbids "knowingly receiv[ing] any visual depiction that has been . . . mailed. . . ." 18 U.S.C. § 2252(a)(2) (1978); 18 U.S.C. § 2252(a)(2) (1984).

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2. P.L. 95-225, 92 Stat. 7 (1978).

3. Child Protection Act of 1984, P.L. 98-292, 98 Stat. 204 (1984).

Miller contends that Congress amended the statute because it was concerned about individuals who distributed these materials without any commercial purpose. He argues that Congress did not intend for the statute to apply to persons who knowingly receive child pornography without intent to distribute the material.

"In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States v. Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981). The language of 18 U.S.C. § 2252(a)(2) is patently unambiguous; therefore, our only inquiry is whether the plain meaning of the statute is called into question by the legislative history.

> In its Report, the House noted:
>
> Perhaps the most important limitation in existing law is the "commercial purpose" limitation. Utilization of 18 U.S.C. Section 2252 has been inhibited by that statute's limited application to the distribution of child pornography only for commercial purposes. . . . Many of the individuals who distribute materials covered by 18 U.S.C. Section 2252 do so by gift or exchange without any commercial motive and thus remain outside the coverage of this provision.

H.R.Rep. No. 98-536, 98th Cong., 1st Sess. 2, *reprinted in* 1984 *U.S. Code Cong. & Ad. News* 492, 493. The Committee concluded that "[s]ince the harm to the child exists whether or not those who initiate or carry out the schemes are motivated by profit, the Subcommittee found a need to expand the coverage of the Act by deleting the commercial purpose requirement." *Id.*, H.R. Rep. 98-536 at 2-3; 1984 *U.S.Code Cong. & Ad.News* at 493-94.

[1] Miller's contention that he played no part in the distribution network since he did not intend to disseminate the material is specious. Obviously, the industry would disintegrate absent willing buyers, who play a necessary role in any distribution network. Since Miller has failed to show a "clearly expressed legislative intent" that undercuts the statute's unambiguous prohibition of knowingly receiving child pornography through the mail, we conclude that his conduct is not exempt from the reach of 18 U.S.C. § 2252.

CONSTITUTIONALITY OF THE STATUTE AS APPLIED TO MILLER[4]

Miller's second argument is that if Section 2252(a)(2) applies to his conduct, the statute violates his right to privacy and is unconstitutional. He contends that his right to possess pornography under *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), implies a right to receive it for his own use.

In *Stanley*, a state officer who was in Stanley's home to search fo revidence of bookmaking discovered obscene films in Stanley's bedroom. Stanley was later convicted of violating a Georgia law prohibiting the possession of obscene material. The Supreme Court struck down the conviction, determining that:

> If the First amendment means anything, it means that a State has no business telling a man, sitting alone

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4. Neither obscenity nor child pornography is protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). Accordingly, the contours of the right to possess each are coextensive for the purposes of our examination, and prior decisions on the issue of the right to possess obscene materials are controlling in our analysis of this case.

> in his own house, what books he may read or what films he may watch. Our whole constitution heritage rebels at the thought of giving government the power to control men's minds.

394 U.S. at 565, 89 S.Ct. at 1248.

The Supreme Court has refused, in subsequent opinions, to enlarge its holding in *Stanley*. In *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971), the district court had relied upon *Stanley* in dismissing an indictment against a defendant charged with the knowing use of the mails for the delivery of obscene materials, in violation of 18 U.S.C. § 1461. The district court reasoned that "if a person has the right to receive and possess [obscene] material, then someone must have the right to deliver it to him." 402 U.S. at 355, 991 S.Ct. at 1412. The Supreme Court rejected this interpretation, noting that in *Stanley* the focus "was on freedom of mind and thought and on the privacy of one's home. [*Stanley*] does not require that we fashion or recognize a constitutional right . . . to distribute or sell obscene materials." 402 U.S. at 356, 91 S.Ct. at 1412. Similarly, in *United States v. Thirty-Seven Photographs*, 4023 U.S. 363, 376, 91 S.Ct. 1400, 1408, 28 L.Ed.2d 822 (1971), which involved the issue of whether customs agents could intercept obscene photographs imported for commercial use, the Court concluded that the *Stanley* right "does not extend to one who is seeking . . . to import obscene materials from abroad, whether for private use or public distribution."

In *United States v. 12 200 Ft. Super 8MM. Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), the Court rejected the argument that *Stanley* created a right to acquire obscenity. *Stanley*, the Court said, "reflects no more than

. . . the law's 'solicitude to protect the privacies of life within [the home].' " 413 U.S. at 127, 93 S.Ct. at 2668. On the same day, the Court decided *United States v. Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973), rejecting the argument that *Stanley* precluded federal regulation of interstate transport of obscene material where the transport was by private carriage or was intended for private use. According to the Court's opinion in *Orito*, "[*Thirty-Seven Photographs*] and [*Reidel*] negate the idea that some zone of constitutionally protected privacy follows such material when it is moved outside the home area protected by *Stanley*." 413 U.S. at 141-42, 93 S.Ct. at 2677.

[2] Since appellant Miller took the booklet from his post office box directly to his home, he claims that his privacy is so inextricably linked to the conduct the Government seeks to prevent that it cannot constitutionally apply the statute to him. Although the Supreme Court has not spoken directly on this point, we think it reasonable to conclude that Miller's argument is foreclosed by *Reidel*, *Thirty-Seven Photographs*, *12 200-Ft. Reels* and *Orito*.

Miller was charged with, and pled guilty to, a crime that occurred before the material ever reached his home. The fact that the booklet ultimately came to rest in his home does not retroactively insulate Miller from prosecution. As explained by the Supreme Court,

> [i]f obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of the home," which was hardly more than a reaffirmation that "a man's home is his castle."

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66, 93 S.Ct. 2628, 2640, 37 L.Ed.2d 446 (1973).

The Court has been emphatic about the limited nature of the *Stanley* right. *See, e.g., Reidel*, 402 U.S. at 356, 91 S.Ct. at 1412; *Thirty-Seven Photographs*, 402 U.S. at 376, 91 S.Ct. at 1408; *12 200-Ft Reels*, 413 U.S. at 127-28, 93 S.Ct. at 2668-69; *Orito*, 413 U.S. at 141-42, 93 S.Ct. at 2676-77. Accordingly, we hold that *Stanley* is not properly expanded to create a right to knowingly receive child pornography through the mail.

Having determined that the statute applies to Miller and proscribes his conduct without damage to his constitutional rights, we hereby AFFIRM the district court.